No. 174.

Brf. of Atty. Gen.l (Pradt v. Russell)
for Appellant.

Filed Oct. 11, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

UNITED STATES, APPELLANT,
v.
LEWIS A. EATON, APPELLEE. } No. 174.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

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v.
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APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims, and the usual findings of fact have been made. The claim is for salary and fees by one who, in the absence on leave and after expiration of leave of the minister resident and consul-general at Bangkok, Siam, acted in his place. The minister undertook to appoint him "acting consul-general" on June 23, 1892, and on July 12 following left Siam, and claimant acted until May 17, the minister not returning. The vice-consul-general, appointed in 1891, had previously left Siam. He was absent until February 11, 1893, and did not take charge under his appointment until May 18, 1893, when the claimant had ceased to act.

The Court of Claims has given judgment upon the petition of claimant for salary and fees as to a regularly appointed vice-consul-general, treating the minister resident and consul-general's salary as that of a consul-general. The appellant denies that the Government owes the claimant for any salary or fees.

ASSIGNMENT OF ERRORS.

1. The court erred in not dismissing the petition of claimant.

2. The court erred in allowing for any salary or sums of money as accruing prior to the approval of the bond of claimant as vice-consul-general.

3. The court erred in allowing for any salary or sums of money as accruing prior to the approval of the bond of claimant as acting consul-general.

4. The court erred in allowing any sums to the claimant for diplomatic services.

5. The court erred in treating the salary of minister resident and consul-general as salary of a consul-general only and making its allowance to claimant as vice-consul-general accordingly.

6. The court erred in allowing Eaton, not being a minister, consular officer, or consular notary, to recover fees illegally collected and voluntarily paid into the Treasury.

BRIEF OF ARGUMENT.

It is impossible to see, in the opinion or findings of the Court of Claims, what that court considered "Eaton's status during Boyd's absence." (R., p. 13.) It finds that

he performed, under whatever authority Boyd's paper gave him (finding 6, R., p. 10), whatever duties were required in Siam of a minister resident and consul-general, with the knowledge of the Department of State and with that Department's approval. (Finding 7, R., p. 10.) This performance and the approval of it, if Eaton was a consular officer of any kind, were violations of the important law forbidding such officers to perform diplomatic functions. (R. S., 1738.) It finds, also, that the claimant gave bond as "acting consul-general," and that the State Department approved such bond (finding 8, R., p. 10); also that he afterwards gave bond as vice-consul-general, and that the State Department approved this also (Ibid.). But an "acting consul-general" is not or would not be an acting minister resident; and as for a vice-consul-general, one had already been appointed, and there was no intention to remove him, but a clear intention to retain him in office, which was done. The intention was that Eaton should act only until R. B. Boyd, the vice-consul, who was expected back, should reach Siam. (Finding 3.) He was made interpreter and prison keeper (finding 10), and S. H. Boyd disputed his claim to pay as vice-consul-general. (R., p. 7.)

It is not the fault of the Court of Claims that, having determined that Eaton's claim should be allowed, it was at a loss upon what acts of Boyd or the State Department to settle as fixing the status of Eaton. It is the fault of the facts and the law.

Therefore it is that the same vagueness or uncertainty which prevails in the court's views (R., p. 13) is

seen in the views of the State Department (findings 6 and 8 p. 10), and, going still further back, we find it in the views of the minister resident and consul-general (finding 3, pp. 8, 9).

We shall endeavor to show that all this is because there was no way of reconciling any such pretended appointment of Eaton with the law of the land.

R. S., 1695, provides that vice-consuls, etc., shall be appointed only under regulations to be made by the President, providing for their appointment and the manner of it.

The President's regulations are to be found in Consular Regulations, 1888, sections 36 and 87. The former prescribes the mode of appointing regular vice-consuls, etc.; the latter prescribes the mode of appointing "emergency" vice-consuls. There were no other regulations, and consequently vice-consuls were forbidden to be appointed otherwise than under these. It would be a violation of law to attempt any other appointment.

Examining the facts of this case, we find that no attempt was made to act under section 36, and that no one concerned relied upon that section.

The clearest proofs that the State Department did not are to be found in the direction to Eaton to insert in his bond the date of his appointment and in the fact that R. B. Boyd filled the office of regular vice-consul-general. (Finding 4, p. 10.) He had been appointed in 1891; he was not removed or intended to be removed or replaced by Eaton in that office, but proceeded to qualify and serve under his appointment of 1891. (Ibid.)

The clearest proofs that the elder Boyd had no intention to appoint a successor to R. B. Boyd are, perhaps, the total want of a pretense of authority in the instructions and regulations for him to do so, the clear regulations and instructions showing that he was not to do so, and his use of the title "acting consul-general." (Finding 3, p. 9.) Boyd evidently did not intend to appoint Eaton vice-consul-general, because R. B. Boyd had been appointed to that office, and S. H. Boyd desired that he should keep that office. (Finding 3.)

Boyd did not attempt to act, therefore, under section 36, and the State Department could not ratify what Boyd did not attempt to do, and it did not as a matter of fact intend to appoint or recognize Eaton as the vice-consul-general contemplated by section 36. Section 36 did not authorize the Secretary to appoint two vice-consuls-general at Bangkok, and the Department did not intend to remove R. B. Boyd by appointing Eaton. (Findings 4 and 6, p. 10.)

It is perfectly clear that the validity of Boyd's act was relied upon by Eaton. He asked no confirmation or appointment at the hands of the State Department. Boyd believed he had authority to appoint as he did, and Eaton, being merely a missionary, was doubtless no wiser. (Foot of p. 9.) He seems to have asked no questions of the State Department, intending, no doubt, to put in his accounts when all was over for as large an amount as any possible theory of his status would appear to justify, and to leave that status to be inquired into at that time.

The State Department contented itself with acknowledging his letters, approving his bond, and letting him alone (findings 6 and 4, p. 10) until Vice-Consul-General R. B. Boyd could reach his post, an event which the Department took pains to bring about at as early a day as practicable (finding 4, p. 10). The bond was required and approved as a wise precaution, but the Department was noncommittal as to the status of Eaton, leaving Boyd's act to avail if it could and fail if it must.

As for an appointment as "emergency" vice-consul-general, the President's Regulations, 1888, section 87, provide that if "such a vacancy should occur in a consulate-general, the temporary appointment will be made by the diplomatic representative."

It is under this regulation or none that all concerned believed that Boyd was attempting to act, and the court has found accordingly. (See the beginning and end of finding 6, R., p. 10.)

It does not authorize the Secretary of State, but the diplomatic representative abroad, to appoint, and under R. S., 1695, is the exclusive authority for such temporary appointments. Any temporary appointment not under this section is not only without law, but forbidden by law, since the passage of R. S., 1695.

But the regulation failed to provide for the circumstances which actually arose in this case, and the court has no right to legislate for those circumstances.

Under the regulation there must be a vacancy in the consulate-general and vice-consulate-general, and it must be one requiring the appointment of a person to perform

temporarily the duties. The diplomatic representative is made the judge of the necessity, for he is made the appointing power. The President's regulation has given the head of the Department no power to do anything on the subject.

If the President has not authorized the head of the Department to make such an "emergency" appointment, the head of the Department is without power to ratify what he could not do nor authorize to be done.

Now, Eaton could not be appointed under section 87, because there was no vacancy in the office of consul-general, or because there was no diplomatic representative in Siam. Boyd had been appointed minister resident and consul-general. It was one office with two aspects. He was at Bangkok sick. He was sick in his capacity as a diplomatic officer as well as in his capacity as consul-general. He could not be present, absent, sick, in office, or out of office as consul-general and not as minister resident, or vice versa.

But clearly, when he undertook to appoint Eaton "acting consul-general," there was no vacancy in the office of consul-general, to say nothing of R. B. Boyd being then vice-consul-general (*Marbury* v. *Madison*, 1 Cranch, 137), a proposition which the claimant can not consistently deny or safely admit. Therefore the regulation of the President did not authorize him to make the temporary appointment.

No one else was authorized to judge of the necessity to appoint or to make, ratify, confirm, or in any way meddle with any appointment under that regulation, or to suspend or amend the regulation.

Therefore, the act of Boyd was a violation of section 1695, R. S., and no rights can arise from it. Eaton is presumed to know the law, and participated in an attempt to violate it. He can base no claim on such a proceeding.

If Eaton should seek to rely upon an implied contract arising out of the action of himself and the State Department, it is a sufficient answer that where an express contract is forbidden the law will hardly imply an unexpressed one. (*Cary* v. *Curtis*, 3 How., 249.) No contract, conduct, or custom forbidden by law is good ground of action. (See also 20 Opin. 92, R. S., 1760, 3678, 3679, 3732.)

He had notice by the law and President's regulations referred to in it what could and what could not be done; and if he volunteered under a mistake of law to perform services forbidden to be engaged and performed, he is no worse off than a man who pays money under a mistake of law and can not recover it back.

The notion that a vice-consul is forbidden to be appointed otherwise than as the President directs, except in case of emergency, and then any one can appoint one or the various officials of the State Department bind the Government to pay one by ratification, estoppel, or otherwise, is wholly fallacious. Temporary consuls are all "emergency" men. The law and this regulation undertake to provide for all emergencies, and if there is a *casus omissus* it is for the President to amend his regulations or Congress to amend the laws. Until they do so, R. S., 1695, says no vice-consul shall be appointed in that case.

But let us suppose Eaton was in some way legally appointed vice-consul-general. He could not enter upon

the discharge of his duties as such until he had given an appropriate bond and it had been approved. Then only was he a bonded officer, and no other is permitted to act. It was not intended by Congress that a person should exercise the functions of such an office without an approved—that is, operative—bond. (*United States* v. *Le Baron*, 19 How., 77.) The giving and approval of the bond was a "condition precedent" to taking the office, and there can be no acting in the office until approval. (Ibid.) Referring to regular vice-consuls appointed under Reg. 36, Reg. 47 says they "are not authorized to take charge of their offices or enter upon their duties until the bond has been executed. Until that formality is complied with, the accounts for their compensation will not be adjusted," etc. "Executed" thus clearly means completed as a binding obligation; that is, offered and accepted. Reg. 88 requires the same in this respect of temporary vice-consuls as of permanent officers. The word "approved" is found in the new regulations of 1896 (sec. 51), and they refer to 19 How., 73, and 14 Op., 7, which latter says that a bond speaks only from approval (sec. 35).

But, while a bond as "acting consul-general" was offered and accepted, the acceptance was withdrawn upon objection from the Treasury and the bond withdrawn. (Finding 8, p. 10, and petition, par. 4, p. 1.) It was not until April 23, 1893, that a bond as vice-consul-general was accepted and became operative (finding 8, p. 11), and not until after that that the pretended appointee could legally act, if he ever could.

It is supposed that *United States* v. *Flanders* (112 U. S., 88) is in point; but that case merely decides the

intent of Congress as to the method of computing the compensation of a customs officer regularly appointed and ultimately regularly qualified who was to be paid a percentage of moneys paid over to the Government. The compensation was by a percentage to be computed on moneys "paid over and accounted for under the instructions of the Treasury Department" not to exceed $10,000 a year. The collector paid over and accounted for moneys, and the point was made that he was collecting money from March 11 and did not take oath and give bond until May 15, and that such moneys should not be treated as part of the sum on which to calculate his percentage. The court held the contrary intended, and that is all that was decided. It was not designed to overrule the doctrine of *United States* v. *Le Baron* as to the intent of Congress. The prohibition in R. S., 1697, against *receiving the commission* shows the intent of Congress here. *United States* v. *Bradley* (10 Pet., 342), *United States* v. *Linn* (15 Pet., 270), *Speake* v. *U. S.* (9 Cranch, 28), *City of Chicago* v. *Gage* (95 Ill., 593), *State* v. *Toomer* (7 Rich. S. C. Law, 216), *Sprowl* v. *Lawrence* (33 Ala., 674), *State* v. *Porter* (7 Ind., 204, were governed by the principle of estoppel by deed, or attempts of sureties to avoid their bonds, after regular commission, service, and compensation of officers, because the bonds were informal. The other cases cited by the court seem to show that bonds may be given or oaths taken after the statutory time, but not that a man may enter upon the duties before qualifying when the law says otherwise. (See *State* v. *Colvig*, 15 Or., 57.) These cases seem to leave no doubt that R. B. Boyd filled the office of vice-

consul-general at the time Eaton claims to have occupied it. But, however this may be, the President, acting under R. S., 1695, made a regulation, certainly not inconsistent with law, wherein he prescribed that vice-consuls were not authorized to take charge of their offices or enter upon their duties "until" the bond had been executed, and section 88 shows that this was intended to apply to temporary vice-consuls.

This does not seem to be going beyond the legislative power granted to the President by R. S., 1695, and if valid it is the law applicable to this case. It was a violation of law to enter upon the duties or take charge *until* the bond was given and approved. Of course, no amount of oaths or bonds can supply the want of an appointment.

On this branch of the case the Comptroller's Office is desirous of an expression from this court for its guidance in other cases. (See 10 Opin., 250.)

It does not appear what is meant by "the State Department" in the findings of the court, and this court will take judicial notice that correspondence with consuls-general and acting consuls-general does not imply the personal act of the Secretary of State, which personal act is necessary to an appointment. The assistant secretaries correspond with them almost invariably. (Cons. Reg., 1896, secs. 129, 120, 132; 18 Stat., 85, par. 4.)

If it will be presumed that what purported to be a vice-consul-general's bond was personally approved by the Secretary of State, because R. S., 1698, requires him to approve the sureties, this presumption of his personal action can not go beyond that.

Suppose an "emergency" vice-consul-general had been appointed, it did not personally concern the Secretary of State beyond (if at all) this approval of the sureties. It was not his affair, but that of the diplomatic representative.

Therefore, there is no reason to believe the facts and circumstances set out in the court's findings 6, 7, and 8 as being known to the Department, known personally to the Secretary of State. If the sureties on the bond were deemed sufficient, his duty began and ended when he said so.

This being so, there is no reason to believe that the Secretary of State had personally any information about Eaton or his supposed appointment by Boyd, the circumstances attending it, whether Eaton intended to claim pay from the Government, or what status he would pretend to have. That "the Department was fully informed" as to all this is not stated in the findings. What Eaton claimed to be or to receive did not appear until his accounts were put in, after he had ceased to act. If, therefore, the doctrine of ratification could apply to the facts in the case, the principle must be kept in mind that there must be full knowledge concerning an act, or even an undoubted ratification will not be binding. The only reference to the Secretary of State in the findings (R., p. 10) shows him on November 22, 1892, recognizing R. B. Boyd as vice-consul-general and seeking to get rid of Eaton.

But, again, if the Secretary of State, who alone (and not all parts of the Department of State) had authority to select and appoint vice-consuls—a high per-

sonal trust which no subordinate instrument could discharge for him—does not appear to have known anything about Eaton and his pretended appointment by Boyd, except that he had sent on a bond, it does not appear that the President ever even heard of Eaton.

We have heretofore assumed that Consular Regulations, sections 36 and 87, were intended to be delegations of Presidential power under R. S., 1695, to the head of the Department in one case and the diplomatic representative in another, and that R. S., 1695, intended to and could authorize such delegations.

We come now to the consideration of this question, not in the light of a book prepared by subordinates in the State Department, but in that of the Constitution.

The Constitution, it is submitted, warrants no such proceedings. It places the power of appointing consuls, ambassadors, and judges of the Supreme Court as on a level and solemnly reposes all in the President and Senate acting together.

A vice-consul is a consul within the meaning of that instrument. He is not a subordinate or inferior officer. He is not a deputy consul, consular agent, or clerk to a consul; he is a consul. Being a consul, his appointment can not be vested by Congress "in the President alone" or "the head of a Department" or in "the courts of law," the sole possible depositaries of the appointing power.

The Constitution, in this matter of appointing, recognizes no distinction of greater and inferior among ambassadors, consuls, and judges of the Supreme Court. It is enough that a man is an ambassador or minister. There

is no inferior officer *among* them—there may be inferior officers *to* them. But a vice-consul-general is essentially a consul in control over other consuls, whether temporarily acting or temporarily in office or permanently. He must therefore be appointed by the President and confirmed by the Senate.

This whole subject is learnedly and ably discussed by the Attorney-General in two opinions in 7 Opin., and from some loose language which crept into one of them, has come the failure to distinguish vice-consuls as defined by law *after those opinions were written* (see R. S., 1674, par. 3) and vice-consuls of France and other countries, who are subordinate or deputy consuls—aids to and instruments in the hands of the real consul and employees of his own acting in his name in his absence.

The general logic of those opinions exempts the appointing power as to consuls at small ports and large, temporary and permanent, from the clause in the Constitution about inferior officers. That clause refers to "other officers," not to inferior ambassadors, ministers, consuls, judges of the Supreme Court. All these are first set apart, by reason of the nature of their offices, not their superiority, and it is other officers left to be provided for by law that are classified as inferior. Otherwise, we have the anomaly that Congress can vest in the courts of law or head of any Department the appointment of some of the immediate instruments of intercourse between the Executive and foreign countries, on the pretext that they are inferior officers, because they are temporary officers. Congress might establish temporary consulates

or vice-consulates at places with which the President and Senate did not think it best to have any intercourse, and could cause the Secretary of the Treasury or some court of law to appoint to them.

Within the meaning of the Constitution an ambassador, temporary or permanent, could not be an inferior officer any more than a judge of the Supreme Court could. They could have inferior officers with them or under them; but they themselves were to be appointed by the treaty-making power, the combined power intrusted with foreign relations, and not the President alone, the head of some Department selected by Congress, or some court. The President alone could no more bind the Government by attempting to make a consul than by attempting to make a treaty.

From the Second Congress until 1855 no statute provided for the appointment of any other kind of consular officers than consuls and vice-consuls. These were appointed by the President and Senate and were required to give bond before entering upon the discharge of their duties. (*Dainese* v. *United States*, 15 C. Cls. R., 75, 76.) They were independent officers. The appointment of a consul "will not revoke the commission of vice-consul; it will only suspend his functions during the continuance of the consul within the limits of his jurisdiction. * * * It is understood that consuls and vice-consuls have authority, of course, to appoint their own agents in the several ports of their district, and that it is with themselves alone those agents are to correspond." (Ibid., quoting 3 Jefferson's writings, 188.)

But before 1855, besides these officers there had grown up various others, appointed in various ways, and mentioned in acts of Congress. In 1855 an act was passed remodeling the system. It said nothing about the manner of appointing vice-consuls. Shortly after its passage the Attorney-General, having been asked about the compensation of a person left in charge by the consul, with the sanction of the Department, said that under the fee system which had up to that time prevailed, "the business of the office proceeded on the general responsibility of the consul. The fees were collected and accounted for in his name. He retained his consular establishment. And the duties were performed by the vice-consul as the substitute of the consul, upon such agreement as to the compensation of the former as the parties might have entered into, with the sanction, express or implied, of the Department. When the consulate was actually vacant by the death of the consul or otherwise, and the duties were discharged by an acting consul under the approval of the Department, the latter received the fees to his own benefit, precisely the same as if he had been commissioned as consul." (7 Op., 714.)

All this the Attorney-General derives from the practice of the Department, and he thought this practice "affords a rule of analogy applicable to the enumerated consuls," the salaried consuls of the act of 1855. Under that act the fees belonged to the Government and it followed that the *locum tenens* "is to be paid out of the salary or go uncompensated." "Under the old system the consul, if absent, paid an agreed compensation to his

vice-consul out of his own official compensation in fees; under the new it must be paid by him as before, but not out of his salary. In the present case the consul has additional scope for the compensation of his vice-consul in the notarial and other nonconsular fees, which a consul may receive without accounting therefor to the Government." The conclusion was that under the analogy of the old practice the Department could regulate the matter, and that the temporary appointee could "now receive the salary attached to the same, if such is the will of the Department."

It thus appears that a person was permitted to be left in charge of the consulate, but he was not regarded as having the consular office; the responsibility remained with the consul, all was done in his name, and the person was paid by him, not by the Government. Such a person was nothing more than a personal servant of the consul, permitted to remain in his place, but not act in his own name. Also, that in case of vacancy by death or otherwise, an acting consul was permitted to collect the fees, and by analogy would have been allowed something from the salary, "if such was the will of the Department."

Referring to this situation of affairs, prior to and after the law of 1855, the Court of Claims well says:

> The act of 1856 first brought order out of this chaotic, crude, and to some extent contradictory legislation; separated the consular service into distinct grades; defined the powers, duties, and compensation of each, and provided a mode for the appointment of each. It is therefore quite clear that Congress prior

> to 1856 did not attach definite ideas and significations to the terms which it used in order to describe grades in the consular service. The Executive Departments were equally lax and vague. * * * The Department of State is found to be recognizing as vice-consuls persons named and appointed by consuls, serving in the consulate contemporaneously with the consuls themselves, without warrant of appointment from the Department. We are constrained to think that the early practice was in harmony with the requirements of the Constitution, and that, in the absence of law authorizing a departure from that practice, it should be followed. The claimant, having been appointed vice-consul without the approval of the Senate, is not entitled to be regarded as the lawful incumbent of the office, and can not recover, etc. (*Dainese* v. *United States*, 15 C. Cls. R., 77.) The word consul has two meanings. In its more limited sense it denotes an officer of a particular grade in the consular service; but in the second article of the Constitution and in the third article * * * the word is used in a broader generic sense, and denotes all consular officers of whatever grade. (Ibid.)

How a law was to authorize a departure from the requirements of the Constitution, e. g., the one in question necessitating approval by the Senate, the court does not explain.

The act of 1856 was intended to cover the whole ground, to reorganize the whole consular system, and has been carried into the Revised Statutes. It defines vice-consuls as to "denote consular officers, who shall be substituted, temporarily, to fill the places of consuls when they shall be temporarily absent or relieved from duty."

It forbids the appointment of such consular officers "otherwise than under such regulations as have been or may be prescribed by the President." It prescribes the bond of such consular officers; it provides for their compensation out of the allowance by law for the principal officer and not otherwise, and entitles them to so much thereof as the President may determine, the principal officers to be entitled to the residue.

It can not be doubted, after this law, that a person substituted temporarily to fill the place of a consul relieved from duty is an officer of the United States. He gives bond as such and he is paid, not by the consul, but by the Government. The consul is not responsible for him; he acts in his own name and by virtue of his vice-consular appointment. (*In re Herres*, 33 F. R., 165, Brewer, J.)

No practice or act of Congress can make an officer so defined anything but a consular officer within the meaning of the Constitution. The President must appoint and the Senate confirm him. If he were (as he is not) an "inferior officer," Congress could at most vest his appointment in the President alone, or the head of a Department or a court. Only Congress could vest it in anyone.

Having so defined the vice-consular office and made it a consular office in fact, Congress could not at the same time, even if it were an inferior office, vest the appointment in a diplomatic officer abroad. It can not authorize the President to so vest it or to vest it in any one.

If R. S., 1695, must be held to mean that the *President* may vest in the head of the State Department, or a

diplomatic representative, the appointment of such an officer it is unconstitutional, whether he is an inferior officer or not. It no more requires such a construction than does R. S. 1753.

Boyd was temporarily absent or relieved from duty. Eaton was appointed to fill his place temporarily. He was within the definition of a vice-consul, and therefore within the prohibition to appoint any vice-consul otherwise than under the regulations of the President. It was just such irregular and unauthorized appointments that the prohibition was introduced to put a stop to, and if it does not act upon them it can not have any effect. They constituted the only supposable evil which Congress sought to remedy by the following law of 1856 (R. S., 1695): "No vice-consul, vice-commercial agent, deputy consul or consular agent, shall be appointed otherwise than under such regulations as have been or may be *prescribed* by the President." *Prescribed* means what it says, and the whole sentence fits the case of Eaton as well as if made with foreknowledge of it.

The intent of the law was, or must be held to be, that the President might make regulations for legal and constitutional appointments, and that beyond them there should be no open ground for the old irregular appointments by any and every body in any and every manner.

If the President's regulation 87 is legal and constitutional, the circumstances did not give rise to a case under it; if it was illegal or unconstitutional, then no way remained but under regulation 36, and if that was not acted under or was illegal or unconstitutional, and it was the latter if the President meant to vest any appointing

power in the head of a Department, then there can be no pretense of a basis in it for Eaton's appointment.

The Court of Claims in 1879 seems to have understood that by the act of 1856 (which includes R. S., 1695) Congress had vested the appointment of inferior consular officers in "the President alone." (*Dainese* v. *United States*, 15 C. Cls. R., 75.) That seems to be a reasonable and is a constitutional construction of the law if we are wrong in thinking the Senate must consent and advise. Even regulation 36 might be interpreted to mean "the President alone" where it says Secretary of State; for it is addressed to consuls, and reminds them, not so much that the Secretary appoints, as that they do not appoint, vice-consuls.

It is not uncommon to use "the Department" or "the Secretary" in such cases as a convenient way to distinguish the acts of consuls, collectors, etc., from those of the executive superior, whether meaning the head of the Department or the President, who is in charge over the Department and directs the head of it.

This very practice may have given rise to the illegal regulation 36, if it does mean that the head of the Department is vested by the President with the appointing power. If it means that the President himself appoints, then he must do so personally, for the Constitution and the nature of the act equally forbid the head of a Department to be regarded as identical with the President alone in the matter of appointing officers.

If, prior to the act of 1856, a person appointed by a consul as "my vice-consul" when about to take leave of absence, who took charge and performed the duties as

vice-consul with the knowledge of the legation and Department of State, which continued to transact business with him as vice-consul and after the expiration of the leave received accounts in his name and approved the accounts, which were paid, could not maintain a claim for a part unpaid, or be regarded as a vice-consul, because not confirmed by the Senate (*Dainese* v. *United States, ubi supra*), certainly the act of 1856 expressly forbidding appointments not made in pursuance of the President's regulations, which act defines the duties of the vice-consular office and constitutes it an office in all respects, has not altered the law in favor of such an irregular appointment as Boyd attempted to make. The President and Senate may, it seems, appoint consuls *where* they see fit, and might have appointed Eaton at Bangkok in 1892. So the President may, it seems, employ special agents for extraordinary purposes of international intercourse, and might have so employed Eaton at Bangkok. But if Eaton was to perform the regular duties of minister resident, and especially if he was to exercise the functions of consul, which are fixed by the law of nations and statutes, the consent of the Senate was necessary, for so the Constitution has determined. There should be some way for the public to know whether a man holds an office or not, and the courts should not invent a set of uncommissioned officials about whom no law or regulation gives information to the public, and a salary list for which Congress has made no appropriation.

In our view of the case, Eaton never held the office of vice-consul-general, or any other office, and his claim for salary and fees must be rejected.

If he did, he earned nothing until after the approval of his bond, on April 23, 1893.

If Eaton was not legally in office, his payments into the Treasury were voluntary and were of moneys collected for illegal acts as judge, minister, and notary. Fees for settling estates were official. (Reg. 1888, sec. 508, par. 69.) The item for candles was personal or diplomatic and wholly foreign to consular business. (See R. S., 1738.) If not legally in office, and so entitled to the salary provided for the legal officer, he could not and did not become entitled to any salary or compensation under contract, such contract being prohibited. (R. S., 1760, *et seq.*) Congress has forestalled by every conceivable statute the making of debts of which it knows nothing when laying taxes and making appropriations of the revenue.

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APPELLEE'S BRIEF

[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, *Appellants*,

vs. No. 174.

LEWIS A. EATON, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

Statement of the Case.

Sempronius H. Boyd, the duly appointed and qualified Minister Resident and Consul-General of the United States at Bangkok, Siam, became seriously ill in June, 1892; as he was advised and believed his illness was hopeless. Having obtained a leave of absence with permission to visit the United States, he departed from Bangkok, July 12, 1892, arrived at his home in Missouri, August 27, 1892, and did not return to his post. His health fluctuated until June 22, 1894, when he died. The period of sixty days (his statutory leave with pay), after his arrival at his place of residence, expired October 26, 1892.

(Record, p. 8, Findings I and II, p. 10, Finding V.)

At the time of his illness there was in Siam no vice-consular officer regularly appointed and qualified to assume the official duties. Robert M. Boyd (son of Sem-

pronius H. Boyd) had been appointed Vice Consul-General at Bangkok, Siam, on November 10, 1891, but had not given bond or qualified to assume the duties at the time of the departure of the Minister Rresident and Consul-General from Bangkok. Robert M. Boyd had left Siam for the United States about March 30, 1892, he did not return to Bangkok until February 11, 1893, and he was not recognized by the Siamese Government and authorized to assume the duties of the office until May 18, 1893.

(Record, p. 10, Findings IV and VI.)

On June 13, 1892, Sempronius H. Boyd, the Minister Resident and Consul-General, being physically unable to perform the duties of his office and believing his illness would terminate fataliy, desiring to protect the interests of the United States during his absence and until the arrival from the United States of Robert M. Boyd, called to his aid Lewis A. Eaton (the appellee herein), a citizen of the United States then resident in Bangkok as a missionary, and asked him to take charge of the consulate and its archives. Eaton acceded to the request, accepted the trust, and on said date began the discharge of the duties imposed upon him by Sempronius H. Boyd. Eaton makes no claim for compensation prior to the departure of Boyd on July 12, 1892.

(Record, p. 8, Finding III; p. 10, Finding VII; p. 12, Finding XIII, and p. 13.)

On June 21, 1892, Boyd officially notified the Minister for Foreign Affairs of Siam, of his illness, and contemplated departure from Siam, and that he had designated Eaton as Vice Consul-General to act during his absence. In this notification, Boyd said:

"All the physicians advise me to go soon to a cold climate. The President has wired me to that effect. In

20 or 30 days, I may be strong enough for a sea voyage, of which I will avail myself. I am authorized to designate and do designate L. A. Eaton, Vice Consul-General until I am able to assume. If not imcompatible with public affairs, I beg you to so regard him."

The letter of Boyd is set out in full on page 9, of the Record. Finding III.

(Record, p. 9, Finding III.)

On June 23, 1892, Eaton took and subscribed to the oath of office, which is set out in full on page 9, of the Record, Finding III, and on the same day Boyd, certified thereon, under his hand and seal, writing as "Minister Resident and Consul-General;" that he had that day appointed Eaton acting consul-general.

(Record, p. 9, Finding III.)

Boyd, upon his departure from Bangkok on (July 12, 1892), transferred the charge of the legation and consulate-general to Eaton, who, on July 13, 1892, informed the Department of State that he (Eaton), had assumed charge of the legation and consulate-general.

(Record, p. 10, Findings VI, VII, and p. 13.)

A form of official bond was thereupon sent to Eaton by the Department of State, in which he was designated as "Acting Consul-General;" this bond was promptly executed by Eaton in accordance with instructions, and was received at the Department of State and approved by the Secretary of State, January 3, 1893, subsequently, under instructions from that department, dated January 24, 1893, another official bond was executed by Eaton, as "Vice Consul-General of the United States at Bangkok," which was approved by the Secretary of State on April 23, 1893. Both of these bonds bore date June 13, 1892, with the knowledge and consent of Eaton's sureties

thereon, and were so dated because of a pencil memorandum on each bond when received in blank by Eaton from the Department of State, directing him to insert the date of his appointment in the blank space reserved for the date.

(Record, pp. 10, 11, Finding VIII, and p. 15.)

From July 12, 1892, to and including May 17, 1893, Eaton was in sole charge of the interests of the Government at Bangkok, and as Vice Consul-General in charge of the office, in the absence of the principal officer, he performed whatever duties were required at the post, with the knowledge of the Department of State and with that Department's approval. That Department acknowledged his communications, and acted upon them as communications from a person authorized to perform the duties of Minister Resident and Consul-General in the emergency then existing. Boyd, upon his departure from Bangkok, transferred the charge of the legation and consulate-general to Eaton. Robert M. Boyd, who had been appointed Vice Consul-General, at Bangkok, on November 10, 1891, had not at the date of the departure of Sempronius H. Boyd from Siam given bond or qualified to assume the duties; he was not then in Siam, having left that country for the United States, about March 30, 1892. The Department of State regarded the temporary appointment of Eaton, as required by the emergency.

(Record p. 10, Findings IV, VI, VII.)

Eaton rendered to the accounting officers of the Treasury, his account as Vice Consul-General at Bangkok, for the entire period of his service, in which he charged and claimed one-half of the salary of $5,000, per annum appropriated for said post of Minister Resident and Consul-General, from July 12, 1892 to October 26, 1892;

that is, from the departure of the Minister Resident and Consul-General to and including the date on which his statutory leave of absence for sixty days (excluding transit time) expired, and the full salary at the rate of $5,000 per annum, from October 27, 1892 to May 17, 1893, inclusive.

(Record p. 11, Finding IX.)

Eaton also rendered with his salary account a return of all fees collected and received by him during the entire period of his service, both fees official and unofficial, including fees notarial and fees and fines received in the United States Consular Court, at Bangkok, amounting in all to $245.11. The notarial and unofficial fees and consular court fees and fines included in said sum amounted to $177.41.

(Record p. 11, Finding X. Record pp. 6, 7, Exhibit C.)

During the period he was in charge, Eaton did not assume to act as interpreter or prisoner keeper; he did not claim or receive pay as such; his sole claim for his services was for salary as Vice Consul-General.

(Record p. 11, Finding X.)

Eaton's account was approved by the Department of State and settled by the accounting officers of the Treasury. He was charged with the total amount of fees received by him as aforesaid, to wit, $245.41, and said sum was covered into the Treasury. The one-half salary from July 12, 1892 to October 26, 1892, amounting to $726.90, was suspended for "further information", which was thereafter furnished; but this sum remains unpaid. The full salary from October 27, 1892 to May 17, 1893, amounting to $2,792.35, was allowed and credited, deducting from which, the sum of $245.41 (total

fees charged), leaves in Eaton's favor a balance of $2,546.94, which was certified to his credit by the First Comptroller, December 4, 1893, no part of which has been paid.

(Record p. 11, Finding XI.)

Eaton also rendered to the Department of State his account of disbursements of the contingent fund of the legation and consulate-general, from July 1, 1892 to April 30, 1893, which was approved by said Department. In the settlement of said account by the accounting officers of the Treasury, the sum of $5.73, expended for candles and lanterns, was suspended for information, which was thereafter furnished, but said sum remains disallowed and unpaid.

(Record pp. 11, 12, Finding XII.)

On June 16, 1894, Sempronius H. Boyd filed his petition (No. 18,527) in the Court of Claims, claiming full salary as Minister Resident and Consul-General to Bangkok, at the rate of $5,000 per annum, from July 1, 1892, to February 11, 1893. After his death, his administratrix, Margaret M. Boyd, was made party plaintiff in said suit.

(Record p. 7 and p. 8, Finding II.)

In the settlement of the accounts of Sempronius H. Boyd, the accounting officers allowed and paid him the full salary of the post, at the rate of $5,000 per annum, to and including July 11. 1892, and one-half salary after his departure from Siam, (July 12, 1892) to and including October 26, 1892, when his sixty days leave with pay (excluding time of transit to his home from Siam) expired. The Court of Claims dismissed the petition of Boyd's administratrix, and no appeal has been taken by her.

(Record pp. 15, 17.)

December 5, 1894, Lewis A. Eaton (the appellee) filed his petition in the Court of Claims, in which he made claim for the following items:

For one-half the salary of the post at Bangkok (at the rate of $5,000 per annum), from July 12, 1892, to October 26, 1892, which was suspended by the accounting officers per Report No. 162,708, for "further information," but not thereafter paid, although the information was furnished.	$726.90
For the balance found due and certified in favor of the claimant, by the First Comptroller, December 4, 1893, per Report No. 162,708, no part of which has been paid.	2,546.94
For the notarial and unofficial fees ($114.41) and consular court fees and fines (63.00), erroneously included as official consular fees, and charged to the claimant per Report No. 162,708.	177.41
For the item of disbursement for contingent expenses, suspended per Report No. 162,709, for explanations, and not thereafter paid, although the explanations were furnished.	5.73
Total amount claimed, . .	$3,456.98

(Record, pp. 1 to 4, pp. 11, 12, Findings XI, XIII.)

For the above sum of $3,456.98, the Court of Claims rendered judgment in favor of Lewis A. Eaton (the appellee herein.)

(Record, p. 17.)

BRIEF OF ARGUMENT.

I. Eaton's Appointment.

Consular officers of the United States are defined as follows, in Section 1674, Revised Statutes:

"First. 'Consul-general,' 'consul' and 'commercial agent,' shall be deemed to denote full, principal, and permanent consular officers, as distinguished from subordinates and substitutes."

Vice-consular officers are thus defined in said section:

"Third. 'Vice-consuls' and 'vice-commercial agents' shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty."

The title of "vice consul-general," is authorized in Section 4130, Revised Statutes, as amended by the Act of February 1, 1876. Supplement to Revised Statutes, Vol. 1, second edition, page 97.

Sec. 1695, Revised Statutes, (taken from the Act of August 18, 1856), is as follows:

"The President is authorized to define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice-consuls, vice-commercial agents, deputy consuls, and consular agents, therein, in such manner and under such regulations as he may deem proper; but no compensation shall be allowed for the services of any such vice-consul or vice-commercial agent, beyond nor except out of the allowance made by law for the principal consular officer in whose place such appointment shall be made. No vice-consul, vice-commercial agent, deputy consul, or consular agent, shall be appointed otherwise than under such regulations as have been or may be prescribed by the President."

The authority of a citizen of the United States, in case of any sudden emergency requiring the services of a vice-consular officer, to act in such capacity and perform the duties of the principal officer, subject to the subsequent sanction or confirmation of his appointment as vice-consular officer by the Department of State, was well settled and recognized prior to the Act of August 18, 1856, (2 Opp. Atty. Gen., 521 ; 7 Opp. Atty. Gen., 714), and subsequent to that act (Consular Regulations, 1856, Sec. 41 ; Consular Regulations, 1863, Sec. 285 ; Consular Regulations, 1868, Sec. 307).

Section 6, Act June 11, 1874 (18 Stat., 66), provides, "That any vice-consul who may be temporarily acting as consul during the absence of such consul may receive compensation, notwithstanding that he is not a citizen of the United States."

(Supplement to Revised Stats., Vol. 1, 2d Edition, p. 14.)

The Consular Regulations of 1888, prescribed by the President pursuant to law (Section 1695, 1745, 1752, R. S.), were in force during the period covered by the claim of the appellee. Section 36 of said Regulations prescribes the usual method of appointing vice-consular officers, by the Secretary of State upon the nomination previously made by the principal consular officer. Obviously the appointment of Eaton as Vice Consual-General could not have been in strict conformity with this section. As stated by the Court of Claims (Record p. 13), Boyd, the Minister, acted under the spur of necessity, as he was forced to suddenly leave his post. The temporary appointment of a vice consul-general had to be made, if made at all, without delay.

Boyd, in appointing Eaton as vice consul-general, acted in the capacity of diplomatic representative, and complied

with the requirements of Section 87 of the Consular Regulations of 1888, relating to the temporary appointments of vice-consular officers required by an emergency, which is as follows:

"In case a vacancy occurs in the offices, both of Consul and Vice-Consul, which requires the appointment of a person to perform temporarily the duties of the Consulate, the Diplomatic Representative has authority to make such appointment, with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the Department of State. In those countries, however, where there are Consuls-General, to whom the nominations of subordinate officers are required to be submitted for approval, the authority to make such temporary appointments is lodged with them. Immediate notice should be given to the Diplomatic Representative of the proposed appointment, and, if it can be done within a reasonable time, he should be consulted before the appointment is made. If such a vacancy should occur in a Consulate-General, the temporary appointment will be made by the Diplomatic Representative."

Under a reasonable construction of this section of the Consular Regulations, the conditions existed which authorized the temporary appointment of Eaton as Vice Consul-General, by Boyd as the Diplomatic Representative. The law provides no Secretary of Legation for the post at Bangkok.

(Record p. 13.)

At posts where the dual office of Minister Resident and Consul-General is provided for by law, there is no officer provided except a Vice Consul-General, to act and perform the official duties in the absence of the principal officer, or where there is an actual vacancy in the office, by reason of the death, resignation or removal from office of the principal officer.

Section 87, of Consular Regulations of 1888, must be construed so as to give effect and carry out the manifest purpose and intention for which the section was framed and prescribed. It would be unreasonable, nay absurd, to assume that it was intended to except and exclude from the provisions of this section, the authority of appointing a temporary Vice Consul-General by the diplomatic representative, at all posts where the principal officer holds the dual position of Minister Resident and Consul-General. Yet, if the contention be correct, that this section must be construed so literally and narrowly, as to authorize the temporary appointment of a Vice Consul-General only where there is an absolute and actual vacancy in the offices both of Consul-General and Vice-Consul-General,—where there is no incumbent or appointee of either of said offices,—then under no circumstances could a temporary appointment of a Vice Consul-General be made by the diplomatic representative, at posts where the dual office of Minister Resident and Consul-General is provided for by law, for at such posts the Consul-General is also the diplomatic representative, and there being no incumbent or appointee of such office, no temporary appointment could be made.

If there must be an actual and absolute vacancy both in the offices of Consul-General and Vice Consul-General, or in the offices of Consul and Vice-Consul, to warrant a temporary appointment of a vice-consular officer, under Section 87 of the Consular Regulations of 1888; then, in no case where the principal officer is absent from his post, but still holding the office, could a temporary appointment of a vice-consular officer be made. The Consul-General at London or Shanghai might be absent from his post on leave, in the United States, and the vice-consular officer regularly appointed in accordance with Section 36 of the Consular Regulations of 1888, might die

or leave his post, yet the Minister would be powerless to make a temporary appointment. The policy of our Government and the purpose of the law and the regulations made pursuant thereto, is to preserve the continuity of the office at all foreign posts by providing for some incumbent, in all cases of emergency, to assume and discharge the official duties necessary to be performed. Otherwise, there being no officer authorized to act, grave emergencies might arise which would work injury to the Government and its citizens. It is obvious from the well-known and long established practice and usage of the Department of State respecting the temporary appointment of vice-consular officers, under an emergency, that no such literal and restricted meaning was intended to be given to Section 87 of the Consular Regulations of 1888. The plain intention and purpose for which this section was framed and intended, is to authorize the temporary appointment of a vice-consular officer to assume and discharge the duties of the post, when there is no consular officer or vice-consular officer present to perform the same. Mr. Boyd, in notifying the Minister for Foreign Affairs of Siam, of his illness and contemplated departure, and of the designation of Eaton as "Vice Consular-General" to perform the official duties during his absence, was particular to state he was "*authorized*" to make such appointment.

(Record, p. 9, Finding III.)

Section 87 of the Consular Regulations of 1888, must be construed in accordance with the general rules of statutory construction.

"It is a sound principal," say the Court of Appeals of New York, "that such a construction ought to be put upon a statute as may best answer the intention which

the makers had in view; and that is sometimes to be collected from the cause or necessity of making it, at other times from other circumstances. Whenever the intention can be discovered it ought to be followed, with reason and discretion in its construction, although such construction may seem contrary to its letter."

Tonnele *v.* Hall, 4 Comstock, 140; Sedgwick on Statutory Construction, 2 Ed., pp. 195–6.

"Words in common use, when found in a statute, are to be taken in their ordinary sense, and technical words in their technical sense, unless as respects either a contrary intent appears; but the real obvious intent is to prevail over any mere literal sense."

Sedgwick, Statutory Construction, 2d Ed., p. 224.

"The causes which led to the enactment of a law are to guide us. If one interpretation would lead to an absurdity, the other not, we must adopt the latter."

(Idem. p. 247.)

"Effects and consequences of a construction are to be considered, and where, from a literal interpretation, an effect would follow contrary to the whole intent and spirit of the statute, the intent and not the literal meaning must be regarded."

(Ryegate *v.* Wardsboro, 30 Vt. 746.)

In Murry *v.* Baker, 3 Wheat. 541; the Supreme Court held the words "beyon seas", in a State statute of limitations, to mean "without the limits of the State."

It is not and cannot be contended that the practice and policy of the Department of State respecting the temporary appointment of vice-consular officers, under an emergency, was in any respect different during the time the Consular Regulations of 1888, were in force, than it was before or since that time. It has been practically the same since the act of 1856. Therefore, Section 107

of the Consular Regulations of 1896, is valuable in showing what was the intention and purpose of Section 87 of the Regulations of 1888.

Section 107 of the Regulations of 1896, provides:

"In case a vacancy occurs in the offices both of consul aud vice-consul, or in case of the absence from the country of both of these officers, or in case of other emergencies, which require the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the Department of State." * * * * *

Boyd, in his capacity as diplomatic representative to Siam, notified that government of Eaton's designation as vice consul-general, and asked that he be so regarded, (which consent was granted by that government); and the Department of State was duly notified of Eaton's temporary appointment, immediately after Boyd's departure from Bangkok.

(Record p. 13.)

This temporary appointment of Eaton was sanctioned, approved and ratified by the Department of State. The Assistant Secretary of State said; "the temporary appointment of Mr. Eaton was therefore required by the emergency"; and, in relation to his official dispatches to that Department; "they were duly acknowledged by the Department as communications from a person authorized to perform the duties of minister resident and consul-general in the emergency then existing."

(Record p. 13, also Finding VI, p. 10.)

"The Secretary of State is authorized by law to prescribe the duties of the Assistant Secretaries." (Act June

20, 1874, 18 Stats., at p. 90.) In many of the duties of his Department, he necessarily acts through his assistants, and such action is lawful.

Wilcox *v.* Jackson, 13 Peters, 498; Williams *v.* United States, 1 Howard, 290; see also United States *v.* McDaniel, 7 Peters, 1.

"The vice-consul is in law appointed by the Secretary of State or the President, just as Inspectors of Customs are *in law* appointed by the Secretary of the Treasury (or the President.") * * *

"Whether nominated in the first instance by the Commissioner or by the Consul, the Vice-Consul, when approved by the Secretary of State, is to be deemed a 'person (in)vested by the United States with, and exercising, the consular authority.'"

(7 opp., Att'y-Gen'l., at p. 512.)

The official acts of the Department of State were a ratification of Eaton's temporary appointment and of his authority to perform the official duties at Bangkok in the absence of the principal officer. He was required by the Department of State to execute official bonds, prepared in that Department, the first reciting his appointment as "Acting Consul-General," the second, reciting his appointment as "Vice Consul-General;" both bonds were approved by the Secretary of State.

Eaton's official communications to the Department of State were received and acted upon as communications from a person authorized to perform the duties of the office which Eaton temporarily filled; he was instructed by that Department to perform important official duties.

(Record, p. 10, Finding IV.)

"A subsequent ratification is equivalent to a prior authority."

(Herman's Law of Estoppel, p. 471, Sec. 481; Fleckner *v.* Bank of the United States, 8 Wheaton, 338.

The term "Acting Consul-General," as used in the first bond, and in the certificate as to Eaton's appointment made by Boyd, as Minister Resident and Consul-General, upon the oath of office subscribed by Eaton (Record, p. 9, Finding III), was merely a designation employed in the ordinary sense, without regard to the strict, legal title found in the statute, to denote that the vice-consular officer was acting in the place and stead of the principal officer, just as an Assistant Secretary of an Executive Department of the United States, writes his official title as Acting Secretary, when performing the duties of the head of the department, during his absence or inability to act, although the title "Acting Secretary" is not found in the statute.

This will appear by reference to Section 88, of the Consular Regulations of 1888, and Section 108 of the Regulations of 1896.

The appointment of Robert M. Boyd, as vice-consul-general, on November 10, 1891, did not conflict with the temporary appointment of Eaton. At the time the Minister Resident and Consul-General (Sempronius H, Boyd) left Siam (July 12, 1892), Robert M. Boyd had not given bond as vice-consul-general or qualified to assume the duties; he had left Bangkok on March 30, 1892, and was in the United States at the time Sempronius H. Boyd departed from his post. Robert M. Boyd was not qualified to assume the duties as vice-consul-general at any time during the period covered by Eaton's claim. As stated in the opinion of the Court of Claims (Record p. 13), the appointment of Robert M. Boyd has no bearing upon Eaton's case. Vice-consular officers have "no functions

or powers when the principal officer is present at his post." (Section 19, Consular Regulations, 1888.) No salary or compensation is provided for them as such, and they receive pay only when acting in the absence or in place of the principal officer, and from the allowance made by law for the principal officer. (Revised Statutes U. S., Sections 1695, 1703). There is no inhibition either in the law or in the Consular Regulations, against the appointment of a temporary vice-consular officer while there is one regularly appointed, but who cannot assume and perform the official duties at the time of an emergency requiring such performance; on the contrary, such temporary appointment is expressly authorized in the Regulations, and is sanctioned by usuage of very long standing, which is entitled to the highest consideration.

(United States *v.* Moore, 95 U. S., 763, and authorities therein cited.)

It is contended in the brief of appellants that vice-consular officers cannot be constitutionally appointed, except by the President with the advice and consent of the Senate. It seems to have been the practice in the early history of the Government to appoint vice-consular officers by nomination to the Senate. (7 Opp. Att'y-Gen., 247.) Certainly all consular officers acting temporarily and performing the duties similar to those assigned to vice-consular officers by the Consular Service of Act of August 18, 1856, were not so appointed, (2 Opp. Att'y-Gen., 521; 7 Opp. Att'y-Gen., 714). In tracing the history of the consular service of the United States, prior to the Act of 1856, the Court of Claims, in Dainese *v.* United States (15 C. Cls. R.. 64), said:

"The Act of 1856 (11 Stat. L., 52) first brought order out of this chaotic, crude, and to some extent contradictory legislature; separated the consular service into dis-

tinct grades; defined the powers, duties and compensation of each; and provided a mode for the appointment of each. It is therefore quite clear that Congress, prior to 1856, did not attach definite id[illegible] and significations to the terms which it used in order to describe grades in the consular service."

Referring to the writings of Mr. Jefferson in 1790, the court said:

"It thus appears that at that time consuls and vice-consuls were regarded as independent officers."

Section 31 of the Consular Service Act of August 18, 1856 (now Section 1674, R. S.), declares that "'vice-consuls' and 'vice-commercial agents' shall be deemed and taken to denote 'consular officers,' who shall be substituted temporarily, to fill the places of 'consuls-general,' 'consuls,' or commercial agents,' when they shall be temporarily absent or relieved from duty;" and Section 14 of the same act (now Section 1695, R. S.) authorizes the President "to provide for the appointment" of vice-consuls and vice-commercial agents, "in such manner and under such regulations as he shall deem proper," and further provides that no vice-consul or vice-commercial agent "shall be appointed otherwise than in such manner and under such regulations as the President shall prescribe, pursuant to the provisions of this act."

It is manifest that this act cannot be construed to mean that the "manner" and "regulations," which the President is authorized to "prescribe" for the appointment of vice-consular officers, must be a nomination to and confirmation by the Senate. If Congress had intended such meaning, it could have been expressed in few and simple words. It therefore logically follows that if vice-consular officers cannot be constitutionally appointed except by the President with the advice and consent of the Senate, Section 14 of the Act of August 18, 1856 (R. S. Sec. 1695), is repugnant to the constitution, and therefore null and

void. (Vanhorne *v.* Dorrance. 2 Dall., 304; Marbury *v.* Madison, 1 Cranch., 137.) And if this section of the Act of 1856, be unconstitutional, then the whole of said act stands on doubtful constitutional grounds. If an unconstitutional clause in a statute cannot be rejected without affecting the intent of the legislature, the whole statute must fall.

Spraigue *v.* Thompson, 118 U. S., 90.

Since the Consular Service Act of 1856, the "manner" and "regulations" of appointing vice-consular officers, have been provided in the Consular Regulations prescribed by the President pursuant to law (Sections 1695, 1745, 1752 R. S.); such Regulation have the force of law (Gratiot *v.* United States, 4 Howard, 80; United States *v.* Symonds, 120 U. S., 46). Since the act of 1856, no vice-consular officers have been appointed by the President with the advice and consent of the Senate. Can it be seriously contended that every President and every Secretary of State since 1856, has been guilty of a violation of the Constitution in the matter of the appointment of vice-consular officers, that all such appointments since 1856 have been illegal, and hence the officials acts of vice-consular officers of the United States since 1856, have been without warrant of law? These officers are merely *substitutes* for the principals when absent (Sec. 1674 R. S.); no salary is provided for vice-consular officers, and they are paid only from the salary provided by law for the principals (Sections 1695, 1703, R. S.); they have "no functions or powers when the principal officer is present at his post." (Section 19, Consular Regulations, 1888.)

In the case of Dainese (15 C. Cls. R., 64), which was a claim for services as vice-consul prior to 1856, it was urged by counsel for defendants that prior to the consular service act of 1856, Congress had enacted no statute vesting the

appointment of "inferior consular officers" in the President alone, and that at the time of the alleged service of Dainese (prior to 1856), a nomination to the Senate and confirmation by that body was necessary to entitle a person to hold the office of Vice-Consul of the United States.

The court, as one of the reasons for rejecting the claim of Dainese for services, stated its opinion that the early practice of appointing vice-consular officers by nomination to the Senate, was in harmony with the Constitution, and "in the absence of law authorizing a departure from that practice, it should be followed"; the claimant, having been appointed vice-consul without the approval of the Senate, could not recover any salary for judicial services alleged to have been imposed upon him as vice-consul, even if granted by the Act of 1848. Clearly this opinion recognizes the authority to appoint vice-consular officers without the approval of the Senate, under the Consular Service Act of 1856.

The court further held, as more weighty reasons for rejecting the claim, that Congress did not regard the Act of 1848, as endowing Turkish consulates with a judicial salary, and that the fact that Dainese had furnished no bond either as consul or vice-consul, as required by law, was fatal to his case. Nothing can be found in the Dainese case to support the contention that the Act of 1856, does not constitutionally authorize the appointment of vice-consular officers "in such manner and under such regulations" as the President "shall deem proper."

Commercial agents, who with Consuls-general and consuls are defined by law (Sec. 1674 R. S.) "as full, principal and permanent consular officers, as distinguished from subordinates and substitutes", are by long established usage, appointed by the President alone.

(Consular Regulations, 1888, Section 18, p. 7; Regulations of 1896, Section 15, p. 6.)

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

(Wilcox *v.* Jackson, 13 Peters, 489.)

"The President's duty in general, requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the constitution and laws, required and expected to perform."

(Williams *v.* The United States, 1 Howard, 290.)

It cannot be safely asserted that the President must in person appoint, or approve the appointment, of every vice-consular officer (an officer expressly defined by the statute as "substituted, temporarily, to fill the place" of the principal, when such principal is "temporarily absent or relieved from duty,") in order to make such appointment or approval lawful. In this view of the case, the certificate of appointment issued to a vice-consular officer by the Department of State, and the approval and ratification by that Department of the appointment of a vice-consular officer placed temporarily in charge, under an emergency, may be regarded as the acts of the President. In United States *v.* Hartwell, 6 Wallace, 385—this Court held that a clerk in the office of the Assistant Treasurer of the United States at Boston, appointed by the Assistant Treasurer with the approbation of the Secretary of the Treasury, "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." This case related to a criminal indictment, hence the strictest construction of the statute was adhered to.

II. Eaton's Title to Compensation from the Salary Appropriated by Law for the Post at Bangkok.

The claim of the appellee is for compensation for his services in the capacity of vice consul-general and for services rendered in that capacity. His account was so rendered to the accounting officers of the Treasury and settled by them on that basis. His suit in the Court of Claims was for the compensation allowed him by law as vice consul-general, subject to the provisions of the Consular Regulations. It is not denied that Eaton performed consular services and collected consular fees which were charged to him in the settlement of his accounts. It is not shown that he assumed or performed "diplomatic functions," nor is it material to inquire, since he has made no claim for such services. The Court of Claims, in Finding VII, Record, p. 10, say:

"From July 12, 1892, to and including May 17, 1893, he was in sole charge of the interests of the Government at Bangkok, and performed whatever duties were required there of either a minister-resident or a consul-general, with the knowledge of the Department of State and with that Department's approval."

It is suggested in the brief of appellants that the performance of this duty by Eaton and the approval of it by the Department of State were violations of Section 1738, Revised Statutes.

Said Section of the Revised Statutes, prohibits the exercise of "diplomatic functions" by a consular officer of the United States, when there is in the country to which he is appointed, any officer of the United States authorized to perform diplomatic functions therein, but, otherwise, allows the performance of such duties by a consular officer when authorized by the President. After Sem-

pronius H. Boyd, the Minister Resident and Consul General to Siam, had left Bangkok, there was no other diplomatic officer of the United States in Siam authorized to perform diplomatic functions, during the period Eaton was in charge of the legation and consulate-general. It cannot be assumed, in the absence of any proof, that the Secretary of State (or the Assistant Secretary) violated the law, in approving the duties which were performed by Eaton, or that Eaton violated the law in the performance of such duties.

In United States *v.* Peralta (19 Howard, 343), the Supreme Court said:

"We have frequently decided that 'the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.'"

The courts ought to require very full proof that an officer has transcended his powers, before they so determine it.

Srother *v.* Lucas, 12 Peters, 410.

Prior to the consular service act of 1856, it was well settled that a vice-consular officer, acting during the absence of his superior, or during a vacancy in the office, shall be compensated out of the salary appropriated by law for the principal officer.

In the case of Charles J. Coxe, who, without any regular appointment remained in charge of the office and performed the duties upon the death of his father, who was U. S. Consul to the Barbary States, and died while in office, Attorney-General Taney, in 1832, advised the President, as follows:

"The salary claimed by Charles J. Coxe, during the time he acted as Consul, may I think, be legally paid him as salary. The law of May 1, 1810, gives the salary to

the Consul for his personal service and expenses. If, after the death of Mr. Coxe, his son performed the services and incurred the expenses of a residence there, and his acts have been recognized by the Government, I do not perceive why he should not receive the compensation fixed by law for such services. He was *de facto* Consul for the time, and the public received the benefit. What services he performed, or had to perform, I have not the means of knowing, and the opinion I expresss is founded on the presumption that he rendered faithfully whatever services a Consul duly appointed would have rendered for the time, and that the Government have adopted his acts in that character. The practice of the Government sanctions this opinion, as appears by the papers before me, and in several instances similar to this since the law of 1810, the salary has been paid. I refer to the case of Mr. Folsom, in 1818 and 1819; Mr. Heap, in 1823 and 1824; Mr. Simpson, in 1820 and 1821; and Mr. Hodgson, in 1819.

"The public interest requires that the duties of the office should be discharged by some one, and where, upon the death of the consul, a person who is in possession of the papers of the consulate, enters on the discharge of its duties and fulfils them to the satisfaction of the Government, I do not perceive why he should not be recognized as consul for the time he acted as such, and performed the services to the public, and if he is so recognized, the law of Congress entitles him to his salary."

(2 Opp. A. G., 521.)

The opinion of Attorney-General Taney in this case, touching the right to compensation of a person acting without any regular appointment, and performing the duties of the principal officer in a foreign country, is in line with the decision of the Court of Claims in Savage's case (1 C. Cls., R. 170), made at a later date, (1865) in which the court held that:

"A party acting and treated by the United States as their *charge* in a foreign country during the absence of their minister, may recover the value of his services &c., although he received no specific appointment."

In 1856, Mr. Marcy, Secretary of State, in a letter bearing the date of June 3d, propounded the following questions to the Attorney-General, respecting the compensation of vice-consuls:

1. "When a consul is absent from his post, is the person whom the consul, with the sanction of the department, has left in charge of the consulate, and performing the duties, entilted to the statute salary?"

2. "If a consulate becomes vacant by death, resignation or the removal of the incumbent, is the individual who shall have been placed by a minister or other authorized agent of the Government in charge of the office, entitled to the salary?"

Attorney-General Cushing, in answer to Mr. Marcy's inquiries, held, "that the substitute consul or *locum tenens*, is to be paid out of the salary or to go uncompensated."

Mr. Cushing's answers to the questions propounded, are stated as follows:

1. "A substitute or vice-consul, left in charge of the consulate during the temporary absence of the consul, is to be compensated out of the statute emoluments of the office, subject to the regulations of the Department."

2. "An acting consul, in charge of a consulate during actual vacancy of the consulate, is entitled to receive the statute compensation of the office."

(7 Opp. A. G., 714.)

Mr. Wharton, in his Digest of International Law (Vol. I. Sec. 118, p. 772), prepared while he was Solicitor of the Department of State, in 1886, adopts the foregoing answers of Mr. Cushing, as the proper construction of the law governing the compensation of vice-consular officers of the United States.

Section 1695, Revised Statutes (taken from Section 14,

Consular Act of August 18, 1856), and hereinbefore cited, provides that no compensation shall be allowed for the services of a vice-consular officer "beyond nor except out of the allowance made by law for the principal consular officer," in whose place such vice-consular officer may temporarily act.

Section 1703, R. S. (taken from Sec. 15 of said Act), is as follows:

"Every vice-consul and vice-commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer."

Section 471, (clauses 1 and 2, pp. 167, 168) of the Consular Regulations of 1888, (which were in force during the time Eaton was in charge at Bankok), determines the compensation to be paid to vice-consular officers, as follows:

1. "In case the principal officer is absent on leave for sixty days or less, in any one calendar year, and does not visit the United States, the vice-consular officer acting in his place is entitled to one-half of the compensation of the office from the date of assuming its duties unless, there is an agreement for a different rate, the principal officer receiving the remainder. But after the expiration of the sixty days, or after the expiration of the principal's leave of absence (if less than sixty days), the vice-consular officer is entitled to the full compensation of the office."

2. "If the principal visits the United States on such leave and returnes to his post, the foregoing rule will include the time of transit both from and to his post, as explained in paragraph 460. But if the principal does not return to his post, either because of resignation or otherwise, the

rule will embrace only the time of absence, not exceeding sixty days, together with the time of transit from his post to his residence in the United States."

The provision in the foregoing section of the Consular Regulations limiting the pay of the principal officer, when absent from his post, to sixty days, with time of transit going to and returning from the United States, added, is based on Section 1742 of the Revised Statutes U. S., which is as follows :

"No diplomatic or consular officer shall receive salary for the time during which he may be absent from his post, by leave or otherwise, beyond the term of sixty days in any one year; but the time equal to that usually occupied in going to and from the United States in the case of the return, on leave, of such diplomatic or consular officer to the United States may be allowed in addition to such sixty days."

The compensation of a vice-consular officer, who fills the place of the principal, continues during the entire time he acts in the absence of the principal and performs the duties, even if in excess of the statutory leave of the principal, nothwithing the salary of the principal ceases by operation of law after the expiration of his absence for sixty days (excluding transit time).

12 opp. Atty. Genl. 410.

The foregoing provisions of the law and Consular Regulations govern and regulate the salary of Boyd (the minister-resident and consul-general) after his departure from his post (July 12 1892), and the compensation of Eaton as vice-cousul-general, from that date to May 17, 1893, when Eaton was relieved.

The compensation of a vice-consular-officer at posts where the principal holds the combined office of minister

resident and consul-general, is governed by the Consular Regulations, and differs in no respect from that of vice-consular officers at posts where the principal is a consul-general or a consul.

The "Personal Instructions to Diplomatic Officers of the United States", issued by the Secretary of State, require officers who hold the combined or dual office of Minister Resident and Consul-General, to follow the Consular Regulations in the matter of their official accounts.

Section 35, page 11, of the "Personal Instructions to Diplomatic Officers," of 1885, which were in force during the period of Eaton's claim, is as follows:

"When the office of Consul-General is added to that of Minister Resident, Charge d'Affaires, or Secretary of Legation, the diplomatic rank is regarded as superior to the consular rank The officer, however, will follow the Consular Regulations in regard to his consular duties and official accounts, keeping correspondence in one capacity separate from correspondence in the other."

The accounts of both Boyd and Eaton were settled by the accounting officers of the Treasury in accordance with the foregoing provisions of the law and Consular Regulations, as shown in the Findings of the Court of Claims, IX, X and XI, (Record p. 11).

Boyd was allowed the full salary of the post up to the date of his departure therefrom (July 12, 1892), and the one-half salary from July 12, 1892 to and including October 26, 1892, the date on which his statutory leave of absence for sixty days (after his arrival at his home in Missouri) expired. (Record p. 15.) After the expiration of said sixty days Boyd's salary was absolutely stopped by the provisions of Section 1742 Revised Statutes.

There being no agreement between Boyd and Eaton as to the compensation of the latter, Eaton is entitled under

the law and Consular Regulations (Section 471, clause 1, p. 167), to one-half of the salary of the post from the date of Boyd's departure to the expiration of his statutoy leave of sixty days, to wit: from July 12 to October 26, 1892, and to the full salary from October 27, 1892 to May 17, 1893. The accounting officers suspended the one-half salary due Eaton from July 12, 1892 to October 26, 1892, (amounting to $726.90), "for further information," it being alleged that there was an agreement between Boyd and Eaton by which Eaton was to receive the pay of interpreter and prison-keeper to the post at Bangkok.

(Record p. 15.)

Eaton received no pay either as interpreter or prison-keeper, nor did he act or assume to act in either capacity. He furnished to the accounting officers the information asked for, but the one-half salary from July 12, 1892 to October 26, 1892, has not been allowed or paid.

(Record, p. 11, Findings X, XI.)

Eaton was allowed and credited by the accounting officers, with the full salary of the post from October 27, 1892 to May 17, 1893, and charged with the total amount of fees of all kinds (including unofficial and notarial fees), which left a balance of $2,546.94, due to him, which was certified in his favor by the First Comptroller of the Treasury, on December 4, 1893, but payment of this sum is refused and no part of the same has been paid.

(Record, p. 11, Finding XI.)

These two items of $726.90 and $2,546.94, amounting to $3,273.84, are allowed by the Court of Claims to Eaton, for his compensation as vice-consul general; no part of the same is for compensation in any diplomatic capacity or for diplomatic services.

The comptroller refused to pay these items, pending a decision by the courts, as to the legal right of Eaton to receive any compensation whatever, prior to the date of the approval of his bond, as vice-consul general, by the Secretary of State.

Eaton assumed the duties of the office at Bangkok on July 12, 1892, when Boyd left his post for the United States. His first bond, prepared and sent to him by the Department of State, and executed as "acting consul-general," was approved by the Secretary of State, January 3, 1893; his second bond, also prepared and transmitted by the Department, and executed as "vice-consul-general," was approved by the Secretary of State, April 23, 1893.

(Record pp. 10, 11, Finding VIII.)

This brings us to consider:

III. Eaton's title to Compensation for Services Performed prior to the Execution of his Bond or to the date of the approval thereof.

Under the circumstances attending Eaton's appointment, he gave bond as soon as he could. The forms of the bonds which he executed were prescribed by the Department of State, and both were executed with diligence and in accordance with the directions he received from that department. Manifestly it would have been impossible for Eaton, (or any vice-consular officer appointed under like circumstances), to have executed a bond, transmitted it to the Department of State, and secured the approval of the Secretary of State thereon, prior to the date on which he assumed the duties of his office.

As stated in the opinion of the Court of Claims (Record, p. 15): as Eaton "was designated by Boyd prior (necessarily) to confirmation by the Department of State and

had to await approval from that department—instructions and a form of bond—a period necessarily elapsed between his designation to the office and the approval of his bond by the department. In the nature of things this was unavoidable."

Lex non cogit ad impossibilia.

(Co. Litt., 231 b.) Schroeder *v.* Hudson River R. R. Co., 5 Duer, 55, 62.)

"No text imposing obligations is understood to demand impossibe things."

(Sedgwick on Statutory Construction, 2d Ed., p. 247.)

Clauses 1 and 6 of Section 471, of the Consular Regulations, 1888, pp. 167–169, provide that the compensation of a vice-consular officer shall begin upon the date he assumes the duties of the office of the principal officer, that is upon the departure of his superior officer.

The same provision is contained in Section 506 (clauses 1 and 6) of the Consular Regulations of 1896.

This provision, as to the time when the compensation of a vice-consular officer begins, rests upon the long established custom of the Department of State, acquiesced in and adopted by the accounting officers of the Treasury as a rule of department practice (Record, p. 15). This rule was followed by the accounting officers in the settlement of Eaton's account. This rule of practice, to say nothing of the authority of the Consular Regulations, is entitled to great consideration.

United States *v.* Gillmore, 8 Wallace, 330; United States *v.* Moore, 95 U. S., 760, (at p. 763) and authorities there cited.

Section 1698, Revised Statutes, is as follows:

"Every vice-consul shall, before he enters on the ex-

ecution of his trust, give bond, with such sureties as shall be approved by the Secretary of State, in a sum not less than two thousand dollars nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office according to law, and for truly accounting for all moneys, goods, and effects, which may come into his possession by virtue of his office. The bond shall be lodged in the office of the Secretary of the Treasury."

(See also, Section 39, p. 16, Consular Regulations, 1888.)

As required by Section 47, p. 18, Consular Regulations, 1888, the bond of a vice-consular officer must be executed, approved and filed, before his accounts for compensation can be adjusted at the Treasury or any compensation paid; and such has been the rule of practice of the accounting officers. But where a vice-consular officer has been permitted by the Government to enter upon and discharge the duties of the office, for a period of time prior to the date of his giving bond, or prior to the date of the approval of his bond, and his services have been accepted, and his bond afterwards filed and approved, it has been the long established rule to allow and pay his compensation from the date on which he assumed the duties of the office as provided in Section 471, of the Consular Regulations, (clauses 1 and 6).

The compensation for services rendered and accepted, prior to the date of giving bond or prior to the date of approval of the bond, is not forfeited because the bond was not given within the time prescribed in the statute.

"There is", said Lord Mansfield, in Rex *v.* Loxdale, 1 Burrow, 447, "a known distinction between circumstances which are of the *essence* of the thing required to be done by an Act of Parliament, and clauses *merely directory*. The precise time in many cases is *not* of the *essence*." Following this principle, the courts have, by

great weight of authority, held that statutes requiring that bonds shall be given by public officers within a specified time, although couched in the most explicit language, are directory only.

In United States *v.* Bradley, 10 Peters, 343, one of the questions for decision was, whether a paymaster was entitled or authorized to act as such, who had not given the bond provided by the statute (Act April 24, 1816, Sec. 6, 3 Stats., at Large 298), requiring paymasters to give bond "*previous to their entering on the duties of their respective offices.*"

Story, J., delivering the opinion of the court (at p. 364), said :

"Before concluding this opinion, it may be proper to take notice of another objection raised by the third plea, and pressed at the argument. It is that Hall was not entitled to act as paymaster until he had given the bond required by the Act of 1816, in the form therein prescribed, and that, not having given any such bond, he is not accountable as paymaster for any moneys received by him from the Government. We are of a different opinion. Hall's appointment as paymaster was complete when his appointment was duly made by the President and confirmed by the Senate. The giving of the bond was a mere ministerial act and not a condition precedent to his authority to act as paymaster."

That portion of the decision in United States *v.* Bradley, above cited, was quoted and affirmed in United States *v.* Linn, (15 Peters, at p. 313,): where, Linn, a Receiver of Public Moneys, required by law to give bond "*before entering on the duties of his office*", had given an unsealed instrument, which the court decided was not a bond, but a valid obligation at common law. The Supreme Court held that the emoluments of the office to which Linn had been appointed, "were the consider-

ations allowed him for the execution of the duties of his office, and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment."

Referring to the decision in United States *v.* Bradley, the court said :

"According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure* as well as *de facto* when the instrument in question was given. And although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law, and being entitled to the compensation and emoluments attached to the office, which was for four years from the 12th of January, 1835, this was a sufficient consideration appearing on the face of the instrument to support the promise."

In the City of Chicago *v.* Gage, 95 Ills., 593, where the city charter provided that all officers who were required to give bond for the faithful performance of official duties, should *"file their bonds with the city clerk within fifteen days after their election;"* the Supreme Court of Illinois in an elaborate opinion, reviewing many previous authorities, held these provisions to be directory only—that "a failure to file in time does not, of itself, annul or avoid the right or title to the office, but merely renders it voidable or defeasable. If the officer files his bond strictly in time, his right and title to the office are indefeasable. If he files it afterwards, and it be accepted and approved, his right and title thereupon become equally indefeasable."

To the same effect are :

Speake *v.* United States, 9 Cranch., 28 ;

State *v.* Toomer, 7 Rich, S. C. Law, 216 ;

State *v.* Churchhill, 41 Mo., 41;
Sprowl *v.* Lawrence, 33 Ala., 674;
People *v.* Holley, 7 Wend. (N. Y.), 481;
State *v.* County Court, 44 Mo., 230;
State *v.* Porter, 7 Ind., 294;
State *v.* Falconer, 44 Ala., 696;
State *v.* Colvig, 15 Oreg., 57;
State *v.* Peck, 30 La. Ann., 280;
Kearney *v.* Andrews, 10 N. J. Chancery (Stockton), 70;
State of Maryland *v.* Commissioners of Baltimore County, 29 Md., 516.

As the failure to give the bond within the prescribed time does not of itself work a forfeiture, *a fortiori* is this so, when the failure was through no fault of the officer.

Ross *v.* Williamson, 44 Ga., 501;
State *v.* Hadley, 27 Ind., 496.

The doctrine laid down in the cases cited, does not conflict with the decision in United States *v.* Le Baron, 19 Howard, 73, where one of the questions before the court was, whether the appointment of Oliver S. Beers, as Deputy Postmaster at Mobile, after his confimation by the Senate, was rendered invalid by reason of the subsequent death of the President before the transmission to the appointee of his commission, which had been signed by the President before his death.

In deciding that Beers was duly commissioned under this appointment, the court said (at p. 78):

"When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the ap-

pointee before he shall enter on the possession of the office under his appointment. These acts become conditions precedent to the complete investiture of the office, but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed, and when the person has performed the required conditions, his title to enter on the possession of the office is also complete."

This is entirely in harmony with the doctrine laid down in the decisions previously cited. Where the statute requires the appointee to give bond before entering upon the duties of his office, the giving of such bond is a condition precedent to his "*complete investiture of the office,*" previous to which his title to the office is *voidable or defeasable*, but his failure to give bond within the prescribed time *does not, of itself, annul* or *avoid* his *right* or *title* to the office. In the words of Judge Story, in United States *v.* Bradley (*ante*), "the giving of the bond" is a "*mere ministerial act*, and not a condition *precedent to his authority to act*," in his official capacity and perform the duties of the office.

If the appointee fails altogether to give any bond, where the statute requires it, he never acquires "the complete investiture of the office," and therefore his right to compensation fails.

Dainese *v.* United States, 15 C. Cl. R., 64;
Williams *v.* United States, 23 C. Cl. R., 46.

But where the bond has been given, accepted and approved, although after the time prescribed by the statute, which is merely directory and not of the essence, the defeasable title is made indefeasable and complete,—the party has acquired "complete investiture of the office," which relates back to the beginning of his services; and gives him a perfect right to compensation from that date.

In Williams *v.* United States, (23 C. Cl., R., 46), the claimant, who had been appointed Minister Resident and Consul-General to Hayti, but had not given bond or received his commission, or entered upon the duties of his office, was held not entitled to salary claimed for time occupied in receiving instructions, because he had failed to give any bond.

And in delivering the opinion of the court in that case, the learned Chief Justice clearly recognized the principles already averted to, in these words, (at page 52):

"The question does not arise here, whether such an officer, under some circumstances, and to some extent, might not be held to have been in office and entitled to its salary from the date of his commission or from the date of his taking the oath, if within a reasonable or proper time his bond should be tendered, because the claimant never tendered a bond at any time."

In United States *v.* Flanders, (112 U. S. Reports, 88), the case was directly presented for decision by the Supreme Court, whether a collector of internal revenue who, having been duly appointed by a commission dated March 4, 1863, entered upon the discharge of his official duties as collector on March 11, 1863, but did not take the oath of office or give bond until May 15, 1863, was entitled to any compensation prior to the date of taking the oath and filing his bond.

The provisions of law at that time in force respecting the taking of the oath of office and giving bond are thus stated by the court, in their opinion, rendered November 3, 1884:

"At that time the Act of July 2, 1862, 12 Stat., 502, was in force, which provided that every person appointed to any office of profit under the government, in any civil department of the public service, except the President,

should, 'before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe' an oath or affirmation, the form of which is given. Section 4, of the Act of July 1, 1862, 12 Stat., 433, provided that, before any collector of internal revenue should 'enter upon the duties of his office,' he should give a specified bond with sureties."

Neither the oath was taken nor the bond given until more than two months after the collector had entered upon the discharge of the duties of his office.

The language of the statute then in force respecting the oath of office, (which was carried into Sec. 1756 R. S., and that section repealed by the Act of May 13, 1884, 23 Stat., 22, Sec. 2), is most explicit in its terms, requiring not only that the oath should be taken "*before entering upon the duties*" of the office, but also "*before being entitled to any of the salary or other emoluments thereof.*"

Yet, the court held that the collector was entitled to the compensation provided by the law then in force respecting the compensation of collectors of internal revenue, "from the time when, after receiving his commission, he was permitted by the government to discharge the duties of the office and his services were accepted therein, although, during a portion of such time, he had not taken his official oath nor given his official bond," (at p. 90). The court further said:

"If he is appointed, and acts and collects the moneys and pays them over and accounts for them, and the government accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath 'before being entitled to any of the salary or other emoluments, of the office. But, we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or

appropriate, the commissions as compensation, does not arise until he takes, and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, from the time when under his appointment he began to perform services as collector, which the government accepted, provided he has paid over and accounted for such moneys," (at p. 91).

Clearly, in this case, the court decided upon the question as to the right of an officer to receive compensation for services rendered prior to the date of giving bond and prior to the date of taking the oath of office, (where the oath was taken and the bond filed after he had entered upon his official duties). The fact that the compensation of the collector was "a specified percentage commission, to be computed on the moneys 'paid over and accounted for under the instructions of the Treasury Department'," does not and cannot alter or effect the force of the decision as to the title to compensation prior to the date of giving bond and taking the oath. The method of computing the compensation and ascertaining the amount, in accordance with the statute, could have no logical bearing on the abstract question as to the title to compensation for services performed prior to the date of taking the oath and giving bond.

The statute required that the oath should be taken "*before entering upon the duties*" of the office, and "*before being entitled to any of the salary or other emoluments thereof;*" another statute provided that before any collector of internal revenue should "enter upon the duties of his office," he should give a specified bond with sureties.

The restriction growing out of the statute relating to the oath of office reached not only the salary of the office but other emoluments thereof. The court held that the title to compensation did not arise until the collector had

taken and subscribed the oath, but that after he had done so, his compensation began from the date when he began to perform services as collector. The decision is grounded on the general doctrine already adverted to and accords therewith. It is directly applicable to the title of the appellee to compensation for services performed prior to the date of his giving bond and to the date of the approval thereof, and is decisive of his reght to compensation from the date on which he assumed the duties of the office in the absence of the principal officer.

IV. The Unofficial Fees.

Eaton inadvertently and erroneously included in his return of fees, rendered with his salary account, fees for unofficial and notarial services performed by him, amounting to $114.41, and also fees and fines collected in the Consular Court at Bangkok, and expended for Consular Court expenses, for which Eaton has not been repaid, amounting to $63.00, making in all, $177.41, which sum the accounting officers charged to him along with the official fees, in the settlement of his accounts.

(Record p. 11, Finding X; p. 6, Exhibit C, and p. 16.)

The unofficial and notarial fees amounting to $114.41, being fees for services not required by law or regulations, were properly allowed to Eaton by the Court of Claims, under the decision in United States *v.* Mosby, 133 U. S. 273, in which fees for services of like character were allowed to the appellee (Mosby). This decision has been followed in the Court of Claims in Stahel *v.* United States, 26 C. Cls. R., 193, and in other cases involving claims for fees of like character.

Included in said amount of $114.41, is the sum of $67.91 for commissions charged for the settlement of of private estates of two decedents, at the rate of 5 per cent.

(Record p. 12, Finding XIII; and p. 6, Exhibit C.)

In the Mosby case above cited, (133 U. S. at page 287, item *f* in Finding 12), this court allowed the five per cent commission on the estate of Alice Evans," holding that this was "a fee in the settlement of a private estate, and was properly allowed" by the Court of Claims. The Court of Claims allowed the same fee for settling decedents' estates in the case of Stahel.

(26 C. Cls. R., 193.)

During the period covered by Mosby's claim, the Consular Regulations of 1874 and 1881, were in force, and were considered by the court in deciding that case (United States *v.* Mosby, 133 U. S. pp. 280, 289). By reference to Sec. 333, par. 56, page 80, Consular Regulations 1874, and Sec. 496, par. 69, page 169, Consular Regulations 1881, it will be seen that the five per cent commission for settling estates of decedents is included in the tariff of consular fees. Nevertheless, the court held that this charge was not an official fee, being for the settlement of a private estate. In the Consular Regulations of 1888, Sec. 508, par. 69, page 181, the same five per cent commission for settling decedents' estates, is included in the tariff of consular fees. On this ground it is claimed in the brief of appellants (p. 23) that the fees for settling these private estates were official. It will hardly be seriously contended that mere inclusion of this five per cent commission for settling decedents' estates, in the tariff of fees in the Regulations of 1888, annuls the decision of this court in the Mosby case, and converts the commission into an official fee.

The item of $63.00, for fees and fines in the Consular Court collected by Eaton, were expended for consular court expenses, as provided in Section 4120 Revised Statutes, (Section 1396, p. 472, Consular Regulations, 1888), and for which expenses Eaton has not been repaid.

(Record, p. 16.)

These fees and fines were improperly included in Eaton's return of fees, which embraced fees of all character received by him, including unofficial and notarial fees and consular court fees and fines. This item was erroneously charged by the accounting officers in the settlement of Eaton's accounts, and was properly allowed by the Court of Claims.

V. Item of Contingent Expenses.

The item of $5.63, expended by Eaton for candles and lanterns, was approved by the Department of State as a proper charge in his account of disbursements for contingent expenses. The charge was for official, not personal expenses. The accounting officers suspended the item for explanations, but failed to allow or pay it after the required explanations were furnished. The expenditure was in the discretion of the Department of State (R., p. 16), was approved by that department, and properly allowed by the Court of Claims.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed as to each of the items recovered in that court by the appellee.

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